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NO. 84-_____

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

MIKAL HABEEB AMUNY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Was Defendant's conditional plea of guilty to the offense of conspiracy voluntary where the record of the Rule 11 plea failed to supply a sufficient factual basis for the plea and the District Court failed to explain the nature of the charges? Rule 11(c) and (f), F.R.Crim.P.; *McCarthy v. U. S.*, 394 U.S. 459 (1969).

2. Was Defendant's warrantless arrest in a public place justified and reasonable?

LIST OF PARTIES BELOW

1. United States of America

2. Mikal Habeeb Amuny

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OCTOBER TERM 1984

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner MIKAL HABEEB AMUNY prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of conviction of the United States District Court for the Western District of Texas, sentencing Petitioner to five years in prison and a fifteen thousand dollar fine. Petitioner was convicted on a conditional[1] plea of guilty to the offense of

1. Rule 11(a)(2), F.R.Crim.P. Petitioner and his co-defendants, Royce Hebert, Aaron Maxwell and Clifford J. Antone reserved for appeal the trial court's denial of their various motions to suppress. Amuny's motion to suppress was based upon his warrantless arrest and the seizure and search of his automobile from a public parking lot. All other co-defendants have likewise filed petitions for certiorari contemporaneously herewith.

conspiracy to possess, with intent to distribute, marijuana, in violation of 21 U.S.C. Sections 846 and 841(a)(1). The appeal to the Fifth Circuit included Petitioner's claim that there was an insufficient factual basis to support his plea.

OPINIONS BELOW

The District court filed an unpublished opinion denying the pretrial motion to suppress, and such is reprinted here as "Appendix A." The Court of Appeals denied Petitioner's challenge to the validity of his guilty plea, as well as his challenge to his arrest, and this opinion is reported in *United States v. Antone,* 753 F.2d 1301 (5th Cir. 1985, and is reprinted here as "Appendix B."

JURISDICTION

Supreme Court jurisdiction is pursuant to 28 U.S.C., Section 1254(1).

The Court of Appeals rendered its opinion on February 11, 1985. Petitioner's panel rehearing was denied on March 15, 1985, and his suggestion for rehearing en banc was denied March 25, 1985.

STATEMENT OF THE CASE

Petitioner adopts the statement of the case contained in the Petition for Certiorari filed contemporaneously by Clifford J. Antone, Petitioner's co-defendant in the District Court and co-appellant in the Court of Appeals. In addition, Petitioner adopts the proffer of evidence recited by the Assistant United States Attorney at the time of Petitioner's conditional plea, as follows:

"THE COURT: Mr. Pierce [Assistant United States Attorney], what in summary would the Government's evidence be as to this count?

MR. PIERCE: Your Honor, on October 28th and 29th, 1982, Customs Patrol Officer Dave Harrison received information from a confidential informant. On those same dates he contacted DEA Special Agent Richard Brazil [sic] in Austin, Texas, and relayed that information to him.

On October 28th, 1982, as a result of the telephone contact with CPO Harrison, DEA Special Agent Richard Brazil [sic] and DPS Narcotics Officer Bob Nesteroff checked the residence of Defendant Antone, Defendant Amuny, the club operated by Defendant Antone and the airport. On October 28th, 1982, Brazil and Nesteroff observed a Buick automobile leased by Defendant Amuny at Browning Aerial Service at the Austin Airport.

On November 1st, 1982, CPO Harrison once again had contact with the confidential informant. Also on that date he contacted Special Agent Richard Brazil [sic] in Austin, Texas. As a result of that contact Agent Brazil had a surveillance placed on the residences of Antone and Amuny, the club operated by Antone and the Jo-Jo's and Denny's Restaurants located at the intersection of IH-35 and Oltorf in Austin, Texas. At approximately 7:00 to 7:30 p.m. on November 1st, 1982, Agent Brazil [sic] saw Defendant Antone at the Jo-Jo's parking lot next to a black Continental registered to Defendant Amuny talking to an unknown black male. A second black male later identified as Defendant Maxwell exited the pickup with a camper shell and walked over and met with Defendant Antone and the unknown black male. Defendant Antone and the unknown black male departed in the Continental automobile, and the Defendant Maxwell departed in the Chevro-

let pickup. Agent Brazil lost surveillance and notified other officers by radio.

Officer Nesteroff observed the Chevrolet pickup being driven by Defendant Maxwell arrive at the resi ence of Defendant Amuny. Defendant Maxwell exited the pickup and entered a blue Oldsmobile, license number AEM 816, which was registered to a James Anderson.

The Government has available to it witnesses who would testify that the Defendant Amuny used the alias of James Anderson in June of 1980 in Galveston, Texas.

Officer Nesteroff followed Defendant Maxwell to Antone's Club. Agent Brazil located the Continental automobile driven by Defendant Antone at Antone's residence. Brazil observed two people enter a Buick automobile located at Defendant Antone's residence and depart the premises. Officer Nesteroff eventually picked up the surveillance of the Buick automobile and identied the driver as Defendant Amuny and Defendant Antone as the passenger. Officer Nesteroff followed the vehicle back to the Jo-Jo's Restaurant located at IH-35 and Oltorf. At the Jo-Jo's Restaurant Agent Brazil and Officer Nesteroff additionally observed in the parking lot the blue Oldsmobile previously drivern by Defendant Maxwell and a vehicle registered to a member of Defendant Granger's family.

Maxwell was subseuently observed entering the vehicle utilized by Defendant Granger and driving to a Seven-Eleven convenience store where he made a phone call. He is then observed by Agent Brazil and Officer Nesterof driving to 1713 Sylvan Drive where he drove into the garage, and the door closed. Within minutes the garage door then opened and Maxwell exited the residence in Granger's vehicle.

Surveillance by Officer Nesteroff and Agent Brazil followed Maxwell back to the Jo-Jo's Restaurant where he had originally departed in Granger's vehicle. Defendant Maxwell was observed getting out of the vehicle and walking into the Jo-Jo's Restaurant. Shortly thereafter Defendant Granger walked out of the restaurant and entered his vehicle. He was arrested by Agent Brazil and others while stopped at a red light. At the time of his arrest Agent Brazil noticed the odor of marijuana coming from Granger's vehicle. Agent Brazil seized Granger's vehicle and obtained a search warrant. A search of the vehicle revealed three bundles of marijuana in the trunk weighing approximately 58 pounds.

Agent Braziel obtained a federal search warrant for the 1713 Sylvan Drive. The search of that residence resulted in the seizure of approximately 800 pounds of marijuana, scales and packaging material for marijuana, personal documents of Defendant Antone, Defendant Amuny's, and the fingerprints of Defendants Hebert, Amuny and Maxwell.

The owner of 1713 Sylvan Drive, Sam Jones, identified the purchaser of that residence as one Roy Sneed as being Defendant Royce Hebert.

Also seized as a result of the search warrant and arrest was a beeper in 1713 Sylvan Drive and a beeper device on Defendant Antone. Both these beepers were registered to the same individual, Allen Black.

There were eight phone calls from a phone utilized by Defendant Granger to either Defendant Antone's personal residence of the beeper or pager device on his person at the time of his arrest.

Those phone calls dated from July 1st of 1982 to October 16th, 1982.

With regards of Defendant Amuny, the Government would introduce in evidence the fact that on June 21st, 1973, he was convicted in the 147th District Court of Travis County, Texas, of the felony possession of marijuana, over four ounces. The approximate weight of the marijuana involved was 150 pounds.

MR. DeGUERIN [counsel for Appellant Amuny]: To which we would object, Your Honor, to the admissibility of such evidence under Rule 404(b) and to the materiality of such evidence, and that such evidence is not a similar scheme, plan or design. We would ask for a ruling of the Court on the admissibility of that evidence on this plea.

THE COURT: The Court will note the objection and respectfully overrule it.

MR. PIERCE: The Government also introduced evidence that Defendants Amuny, Hebert and Antone all attended high school at Thomas Jefferson High School in Port Arthur, Texas, together.

May I have a moment, Your Honor?

* * *

MR. PIERCE: Your Honor, for the record the beeper that I have referred to was in the possession of Mr. Antone that several phone calls were traced to from Mr. Granger's phone. That beeper was recovered from Mr. Antone as a result of his arrest.

MR. MINTON [counsel for Defendant Antone]: At Jo-Jo's parking lot; is that correct?

MR. PIERCE: That's correct.

THE COURT: Mr. Amuny, with the exception of those matters that your counsel objected to on the record, do you agree with the prosecutor's summary as to what you did?

MR. AMUNY: Yes, sir.

MR. DeGUERIN: Your Honor, excuse me, but the agreement is that the evidence introduced at the trial would be that. We do not agree that the evidence is true or false. We take no position on that other than that is what the evidence would be at the trial.

THE COURT: All right, sir. * * *"

(Pages 38-44, transcription entitled "Re-Arraignment", January 30, 1984; Record on Appeal in the Court of Appeals).

REASONS FOR GRANTING THE WRIT

1. (a) THE FACTUALLY UNSUPPORTED PLEA.

Rule 11(f), F.R.Crim.P., provides:

"DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

Furthermore, Rule 11(g), F.R.Crim.P., provides in pertinent part:

"RECORD OF PROCEEDINGS. A verbatim record of the proceedings * * * shall include * * * the inquiry into the accuracy of a guilty plea."

In the leading Fifth Circuit case interpreting Rule 11 requirements, *United States v. Dayton*, 604 F.2d 931 (5th Cir. 1979) (en banc) cert. den. 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980), that Court said:

"As for investigating the plea's factual basis, the present formulation of the rule lays down a test that

> is less clearly subjective than that of the 1966 rule [footnote omitted]. All the same, it retains its clear reference to the trial judge's subjective satisfaction, and we conclude that this remains the test for that judge. *We must review the exercise of that discretion, however, if an appeal is taken from it, and we must do so on the record of the Rule 11 proceeding.* It is therefore encumbent upon the judge to produce a record on the basis of which we can determine that his discretion was not abused." *U. S. v. Dayton,* 604 F.2d at p. 938 (emphasis added).

In the *Dayton* case, as in the instant case, the prosecutor proffered what he intended to prove against Dayton. Unlike the instant case, however, the acts attributed to Dayton conclusively showed the commission of an offense, Dayton agreed that the proffer was true, that he had done the acts and could be proven to have done so beyond a reasonable doubt:

> "Likewise, the narration by the prosecutor, on the record, in the presence of the judge and the defendant, and at the specific request and direction of the judge, of what he meant to prove against Dayton—that on two specified occasions he acted as a ground crew member handling a load of flown-in marijuana —and Dayton's sworn response that he had done so and could be proven to have done so beyond a reasonable doubt established a factual basis for his plea that the judge could properly deem satisfactory [fn. omitted]." *United States v. Dayton,* 604 F.2d at p. 943.

This requirement of a factual basis for a plea of guilty has been consistently followed in the Fifth Circuit: *U. S. v. Graves,* 720 F.2d 821 (5th Cir. 1983) (insufficient factual basis to support plea to misprison of felony);

U. S. v. Davila, 698 F.2d 715 (5th Cir. 1983) (sufficient factual basis for plea to misprison of felony); *U. S. v. Montoya-Camacho,* 644 F.2d 480 (5th Cir. 1981) (sufficient factual basis for guilty plea to conspiracy to transport aliens); *U. S. v. Jack,* 686 F.2d 226 (5th Cir. 1982) (sufficient factual basis for guilty plea to charges of possession of and conspiracy to possess P2P); *Willett v. State of Georgia,* 608 F.2d 538 (5th Cir. 1979) (requirement of a factual basis for plea is constitutional in dimension and may be imposed upon state procedures by federal habeas corpus). Even before the Fifth Circuit's en banc expression of the requirement of factual basis for a plea as appears in *U. S. v. Dayton,* earlier Fifth Circuit cases had so held. Cf. *U. S. v. Price,* 538 F.2d 722 (5th Cir. 1976); *U. S. v. Vera,* 514 F.2d 102 (5th Cir. 1975); *U. S. v. Davis,* 493 F.2d 502 (5th Cir. 1974); *Gilbert v. U. S.,* 466 F.2d 533 (5th Cir. 1972).

Thus, Petitioner Anthony's guilty plea notwithstanding, an appellate court must examine the record to determine whether there exists a sufficient factual basis for his plea. With this in mind, a brief review of sufficiency requirements for a conviction for the offense of conspiracy to possess or distribute drugs is appropriate.

In *United States v. Gutierrez,* 559 F.2d 1278 (5th Cir. 1977), convictions for possession of heroin with intent to distribute and conspiracy to distribute were reversed and an acquittal ordered where the record showed no more than "mere association with other persons involved in a criminal enterprise," proximity to the crime, and actual presence at the scene of the crime:

> "The government has shown that Gutierrez and Gonzalez [a non-appealing, convicted co-defendant] as-

> sociated with one another and that they did so in close proximity (temporarily) to the commission of a crime. But that alone is not enough. We have held that mere association with other persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy. *U. S. v. Barrera,* [547 F.2d 1250 (5th Cir. 1977)]; *United States v. Menichino,* 497 F.2d 935 (5th Cir. 1974); *United States v. Owen,* 492 F.2d 1100 (5th Cir. 1974). Nor does proximity to the crime tip the balance. It is well established that even actual presence at the scene of the crime is not sufficient." *United States v. Gutierrez,* 559 F.2d 1278 at p. 1280, 1281.

See also *U. S. v. Blessing,* 727 F.2d 353 (5th Cir. 1984); *U. S. v. Gordon,* 712 F.2d 110 (5th Cir. 1983); *U. S. v. Cuello,* 599 F.2d 635 (5th Cir. 1979); *U. S. v. Zule,* 581 F.2d 1218 (5th Cir. 1978); *U. S. v. Caro,* 569 F.2d 411 (5th Cir. 1978); *U. S. v. White,* 569 F.2d 263 (5th Cir. 1978), cert. den. 99 S.Ct. 148, 439 U.S. 848, 58 L.Ed.2d 149 (1979); *U. S. v. Palacios,* 556 F.2d 1359 (5th Cir. 1977); *U. S. v. Barrera,* 547 F.2d 1250 (5th Cir. 1977); *U. S. v. Waddie,* 536 F.2d 632 (5th Cir. 1976); *U. S. v. Pena,* 527 F.2d 1356 (5th Cir. 1976), cert. den. 96 S.Ct. 3168, 426 U.S. 949, 49 L.Ed. 2d 1185 (1976); *U. S. v. Murray,* 527 F.2d 401 (5th Cir. 1976); *U. S. v. Lopez-Ortiz,* 492 F.2d 109 (5th Cir. 1974) (rehearing denied), cert. den. sub nom. *Poston v. U. S.,* 95 S.Ct. 630, 419 U.S. 1052, 42 L.Ed.2d 647 (1975).

Turning to the instant record, it shows nothing more than past and present association of Petitioner Amuny with some of the co-defendants[2] and proximity to the

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2. Notably not with Granger, who was arrested driving the vehicle loaded with over fifty pounds of marijuana.

crime. What it does not show, on the other hand, is the type of individualized and particularized evidence necessary to prove participation as a willing member of the alleged conspiracy.[3] This simply does not amount to "proof beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and that the accused, with that knowledge, voluntarily became a part of it." *U. S. v. Gutierrez, supra* at p. 1280.

Similarly, in *U. S. v. Gordon,* 712 F.2d 110 (5th Cir. 1983), the Fifth Circuit summarized the sufficiency requirement in conspiracy cases:

> "In drug conspiracy cases, the government must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it. *U. S. v. Jackson,* 700 F.2d 181 (5th Cir. 1983). * * * The government must show beyond a reasonable doubt that the defendant had the deliberate, knowing, and specific intent to join the conspiracy. *United States v. Galvan,* 693 F.2d 417, 419 (5th Cir. 1982), and this court will not 'lightly infer a defendant's knowledge and acquiescence in a conspiracy.' *Jackson,* 700 F.2d at 185. It is not enough that the defendant merely associated with those participating in a conspiracy, id., nor is it enough that the evidence places the defendant in a 'climate of activity that reeks of something afoul.' *Galvan,* 693 F.2d at 419." *U. S. v. Gordon,* 712 F.2d at 1114.

Although the evidence shows that Petitioner Amuny accompanied Antone to the Jo-Jo's on the night in ques-

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3. Of dubious probative value, if any, was the proffered, but objected to, evidence that ten years earlier Petitioner Amuny had been convicted of possession of marijuana in state court. Presumably the prosecution's theory of relevancy was the "once a thief, always a thief" belief condemned by Rule 404(b), F.R.Ev.

tion, and that Petitioner Amuny, Antone, Maxwell, and co-defendant Granger were all inside Jo-Jo's at one time or another and that they all left at approximately the same time, the evidence does not show that any conversation occurred between Petitioner Amuny and Maxwell or Granger[4] about anything, much less that they conversed about marijuana or the conspiracy in question; the finding of a minuscule amount of marijuana in the search of Petitioner Amuny's car[5] is not probative of his membership in a conspiracy to distribute large amounts of marijuana, and at any rate should have been suppressed because of his unlawful arrest and the unlawful search of his car; the finding of several fingerprints of Petitioner Amuny's on unspecified papers within the "stash house" is not evidence that he was ever in the stash house, much less that if he had been he was there at a time when marijuana was there and knew of its presence; nor does Petitioner Amuny's photograph[6] on a roll of undeveloped film found in the "stash house" tend to establish anything more than, possibly, mere association with the occupants of the house, Hebert and/or Maxwell. Cf. *U. S. v. Blessing, supra; U. S. v. Gordon, supra; U. S. v. Caro, supra; U. S. v. White, supra.*

In short, there is insufficient factual basis to sustain the plea of guilty, and the conviction should be reversed.

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4. It's a safe assumption that since Antone and Amuny traveled to Jo-Jo's together, they conversed, but the nature of their conversation is not evidenced and cannot be assumed to be conspiratorial.

5. This fact was omitted from the prosecution's proffer and should form no part of the consideration of sufficiency. Cf. *U. S. v. Dayton, supra,* as quoted above on pages 5 and 6.

6. The picture shows Petitioner Amuny behind the wheel of an automobile underway, apparently taken by a person in the passenger seat. There is no evidence of when or by whom the photograph was taken.

1. (b) VOLUNTARINESS OF THE PLEA.

Rule 11(c) provides in part:

> "(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty . . . the court must address the defendant personally in open court and inform him of, *and determine that he understands* . . .:
>
> (1) the nature of the charge to which the plea is offered."

For all that appears in the record, Petitioner could have believed that mere presence in the vicinity of the commission of a crime, coupled with past association with participants in the crime, is sufficient to make one guilty of conspiring to commit the crime, for that's all the prosecutor accused him of doing in the tender of proof. No admonishment given by the court would have dispelled this notion. If Petitioner believed this, and pursuant to this belief pleaded guilty, his plea was involuntary. Yet the record produces only evidence that Petitioner was present near the scene of a crime and that he previously associated with the participants; furthermore, nothing was said by the judge or the prosecutor to dispel Petitioner's mistaken belief about the requirements of the law. Thus, there is no affirmative showing that Petitioner voluntarily entered his plea.

In *McCarthy v. U. S.*, 394 U.S. 459 (1969), the Supreme Court stated that the record must affirmatively show the defendant's understanding of the charge and its consequences. The Fifth Circuit, in *U. S. v. Dayton*, 604 F.2d 931 (5th Cir. 1979) (en banc), cert. den. 445 U.S. 904 (1980), likewise required an affirmative showing on the record that the court has informed the de-

fendant of the nature and consequences of his plea and has determined that he understands. The requirement is especially important where the charges are complex or the indictment vague, as is the situation here. Even more so, where the prosecution must rely upon vicarious liability, as is the case here,[7] an explanation of such, and the assurance that the defendant understands it, must affirmatively appear in the record.

Rather than a careful inquiry, the district court substituted a ritualistic machinegun-style litany, ignoring its own caveat from *U. S. v. Dayton, supra,* at page 943, to-wit:

> "We endorse fully the general thrust of *Sierra*[8] and *Lincecum*[9] that a mere ritual does not suffice for compliance with Rule 11. What is necessary is that the trial court, given the nature of the charges and the character and capacities of the defendant, personally participate in the colloquy mandated by Rule 11 and satisfy himself fully that, within those limits, the defendant understands what he is admitting and what the consequences of that admission may be, as well as that what he is admitting constitutes the crime charged* * *." *U. S. v. Dayton, supra.*

Earlier in the same case the Fifth Circuit had said:

> "Charges of a more complex nature incorporating esoteric terms or concepts unfamiliar to the lay

7. The "Pinkerton theory", *Pinkerton v. U.S.*, 328 U.S. 640 (1946).

8. *Sierra v. Government of Canal Zone,* 546 F.2d 77 (5th Cir. 1977): "Routine questions on the subject of understanding are insufficient, and a single response by the defendant that he understands 'the charge' gives no assurance or basis for believing he does."

9. *U.S. v. Lincecum,* 568 F.2d 1229 (5th Cir. 1978).

mind, may require more explication. In the case of charges of extreme complexity, an explanation of the elements of the offense like that given the jury in its instructions may be required * * *." *U. S. v. Dayton, supra,* at p. 938.

Keeping in mind that this was a complex conspiracy charge involving, among others, the principle of vicarious liability, the court gave mere lip service to one of the core concerns of Rule 11: whether the defendant understands the plea. In this strange proceeding the District Judge lined up the defendants from left to right (presumably so he would not confuse them), asked a question, then addressed each defendant in rapid-fire manner. For example:

"THE COURT: Have each of you received a copy of the indictment that names you? Mr. Amuny?

MR. AMUNY: Yes, sir.

THE COURT: Mr. Antone?

MR. Antone: Yes, sir.

THE COURT: Mr. Hebert?

MR. HEBERT: Yes, sir.

THE COURT: Mr. Maxwell?

MR. MAXWELL: Yes, sir.

THE COURT: Have you read it or had it read to you, Mr. Amuny?

MR. AMUNY: Yes, sir.

THE COURT: Mr. Antone?

MR. ANTONE: Yes, sir.

THE COURT: Mr. Hebert?

MR. HEBERT: Yes, sir.

THE COURT: Mr. Maxwell?

MR. MAXWELL: Yes, sir.

THE COURT: Have you discussed with your lawyer the charges contained in the indictment to which you intend to plead guilty, and have you also discussed with your lawyer any possible defenses that you might have to the charge or charges, Mr. Amuny?

MR. AMUNY: Yes, sir.

THE COURT: Mr. Antone?

MR. ANTONE: Yes, sir.

THE COURT: Mr. Hebert?

MR. HEBERT: Yes, sir.

THE COURT: Mr. Maxwell?

MR. MAXWELL: Yes, sir.

THE COURT: You understand the charge, Mr. Amuny?

MR. AMUNY: Yes, sir.

THE COURT: Mr. Antone?

MR. ANTONE: Yes, sir.

THE COURT: Mr. Hebert?

MR. HEBERT: Yes, sir.

THE COURT: Mr. Maxwell?

MR. MAXWELL: Yes, sir."

(Transcript of Re-Arraignment, January 30, 1984, pages 28 through 30; Record on Appeal, Court of Appeals)

This makes a mockery of the language in *U. S. v. Coronado,* 554 F.2d 166 (5th Cir. 1977):

> "We have banished from our jurisprudence the days when defendants were lined up and the guilty pleas were taken in wholesale lots without individualization. The expanded procedure is a new principle that is very sacred to modern day jurisprudence. Even a plea taking session should have more dignity than a bargain basement sale at a department store. It should be unhurried and patient. It should never be so frenetic that the judge's explication of the charge is omitted."
>
> *U. S. v. Coronado, supra,* at p. 172.

The plea was not voluntary.

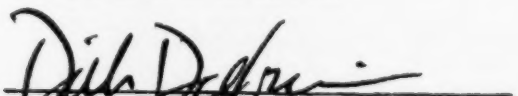
2. THE SEARCH ISSUE. Petitioner Amuny adopts completely the search issue and argument in support thereof made by Petitioner Clifford Antone in his Petition for Certiorari filed contemporaneously herewith.

CONCLUSION

For the reasons stated, Petitioner Mikal Habeeb Amuny prays that the writ be granted.

Respectfully submitted,

DEGUERIN & DICKSON



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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

MIKAL HABEEB AMUNY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

Dick DeGuerin, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari by enclosing three (3) copies of this document in an envelope, first-class postage prepaid and addressed to:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

and a copy to:

United States Attorney
Western District of Texas
300 W. 5th Street, Room 1000
Austin, TX 78701

and depositing the envelopes in the United States Post Office, San Jacinto Station, Houston, Texas 77002, on May 24, 1985, and further certifies that all parties required to be served have been served.

Dick DeGuerin

DICK DEGUERIN

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CRIMINAL NO. A-82-CR-155
and A-82-CR-153

UNITED STATES OF AMERICA

v.

CLIFFORD J. ANTONE,
MIKAL HABEEB AMUNY,
ROYCE DAVID HEBERT a/k/a
ROY SNEED, AND AARON MAXWELL

AMENDED FINDINGS OF FACT

1. On October 28 and October 29, 1982, DEA Special Agent Richard Braziel, in Austin, Texas, was contacted by telephone by Customs Patrol Officer Dave Harrison in Beaumont, Texas. CPO Harrison advised Agent Braziel that he had received information from a confidential informant that Allen Granger and a Randy, last name unknown, were coming to Austin, Texas, to meet Clifford Antone and Mikal Amuny to pick up a quantity of marijuana.

2. Agent Braziel advised Texas Department of Public Safety Narcotics Officer Bob Nestoroff to check the resi-

dences of Antone and Amuny during this period of time. Officer Nestoroff observed nothing out of the ordinary.

3. On November 1, 1982, CPO Harrison again telephoned Agent Braziel. CPO Harrison advised Agent Braziel, that according to his confidential informant, an aircraft had landed with a load of marijuana and Granger was in Austin, Texas, to meet with Antone and Amuny that evening to obtain a quantity of marijuana. CPO Harrison further gave a description to Agent Braziel of the automobile by make, color, and license number that Granger was to be driving and transporting the marijuana.

4. CPO Harrison informed Agent Braziel that his confidential informant had supplied reliable information in the past that had led to six arrests and the seizure of a quantity of marijuana and that the informant was obtaining his information through conversations with Granger.

5. Agent Braziel had also received information prior to November 1, 1982, from a separate confidential informant, to the effect that Antone would conduct his marijuana transactions at a restaurant located near IH35 and Oltorf and would utilize a Black male to make the delivery of the marijuana.

6. Based upon this information, Agent Braziel had a surveillance placed on the residences of Antone and Amuny, the club operated by Antone, and the JoJo's and Denny's restaurant located at the intersection of IH35 and Oltorf in Austin, Texas.

7. At approximately 7:00 to 7:30 P.M., on November 1, 1982, Agent Braziel saw Antone at the JoJo's parking lot next to a black Continental registered to Amuny talking to an unknown Black male. A second Black male, later identified as Aaron Maxwell, exited a pickup with

a camper shell and walked over and met with Antone and the unknown Black male. Antone and the unknown Black male departed in the Continental automobile and Maxwell departed in the Chevrolet pickup. Agent Braziel lost surveillance and notified other officers by radio.

8. Officer Nestoroff observed the Chevrolet pickup being driven by Maxwell arrive at the residence of Amuny. Maxwell exited the pickup and entered a blue Oldsmobile. Officer Nestoroff followed Maxwell to Antone's club.

9. Agent Braziel located the Continental automobile driven by Antone at Antone's residence. Braziel observed two people enter a Buick automobile located at Antone's residence and depart the premises. Officer Nestoroff eventually picked up surveillance of the Buick automobile and identified the driver as Amuny and Antone as the passenger. Officer Nestoroff followed the vehicle back to the JoJo's restaurant located at IH35 and Oltorf.

10. At the JoJo's restaurant, Agent Braziel and Officer Nestoroff additionally observed in the parking lot the blue Oldsmobile previously driven by Maxwell and the vehicle CPO Harrison advised Granger would be driving.

11. Maxwell was subsequently observed entering Granger's vehicle and driving to a 7-11 convenience store where he made a phone call. He is then observed driving to 1713 Sylvan Drive where he enters the garage and the door is closed. Agent Braziel pursues Maxwell on foot and places himself next to the house in some bushes.

12. Agent Braziel walked up to the garage door and heard the trunk open, something being loaded into the trunk, and the trunk closed. He also smelled the odor of marijuana. The garage door then opened and Maxwell

exited the residence in Granger's vehicle. Surveillance followed Maxwell back to the JoJo's restaurant from where he had originally departed in Granger's vehicle.

13. Maxwell was observed getting out of the vehicle and walking into the JoJo's restaurant. Shortly thereafter, Granger walked out of the restaurant and entered his vehicle. He was arrested by Agent Braziel and others while stopped at a red light. At the time of his arrest Agent Braziel noticed the odor of marijuana coming from Granger's vehicle.

14. Agent Braziel seized Granger's vehicle and obtained a search warrant. A search of the vehicle revealed three bundles of marijuana in the trunk weighing approximately 58 pounds.

15. Agent Braziel obtained a federal search warrant for the residence of 1713 Sylvan Drive. The search of that residence resulted in the seizure of approximately 1,000 pounds of marijuana, scales and packaging material for marijuana, personal documents of Antone's and Amuny's, and fingerprints of Amuny and Maxwell.

16. A post search investigation, revealed the residence at 1713 Sylvan Drive had been leased to Roy Sneed who was identified as being Royce Hebert.

17. Seized at the time of the arrest and searched without a warrant were the Buick automobile driven by Amuny and the Oldsmobile automobile driven by Maxwell. Both automobiles were seized from the parking lot of JoJo's restaurant subsequent to the arrests. Agent Braziel testified these cars were seized for forfeiture purposes and because of his community caretaking functions.

18. A post search investigation of 1713 Sylvan Drive found no indicia of residence for Aaron Maxwell. No

keys, clothes, or any other fact would show he resided at that address.

CONCLUSIONS OF LAW REGARDING CLIFFORD J. ANTONE AND MIKAL AMUNY

The Court concludes that there are sufficient facts to establish probable cause to arrest the Defendants Clifford J. Antone and Mikal Habeeb Amuny for their participation as part of the conspiracy. This probable cause is sufficient to arrest without a warrant. The informant's information provided sufficient detailed facts that the officers could conclude that there was probable cause to believe a crime had been committed. The simple facts of a meeting at a restaurant take on a much greater meaning based upon the information that the surveilling agents had obtained from their informants. These facts provide the probable cause that this Court finds is sufficient to allow the arrest in a public place. The past reliability of the informant and the corroboration of other law enforcement officers' independent investigation meets the totality of the circumstances test of *Illinois v. Gates,* 103 S.Ct. 2317, 1983. The Court finds that a person validly arrested on probable cause is subject to search without a warrant. The lawful arrest authorizes such search of the defendants. *Michigan v. DeFillippo,* 443 U.S. 31. Defendants Amuny and Antone lack standing to contest the search of 1713 Sylvan Drive. In order for these defendants to contest this search they must show a privacy expectation regarding the contents of that home. The burden is upon the defendants to do so and the Court observes there has been no evidence produced by these defendants to support any claim they may have. *U.S. v. Salvucci,* 448 U.S. 83 (1980), and *Rakas v. Illinois,* 439 U.S. 128 (1978).

The Court finds the vehicles of Defendant's Amuny and Antone were subject to seizure and forfeiture and properly the subject of an inventory search. *See U.S. v. Staller,* 616 F.2d 1284 (5th Cir. 1980).

CONCLUSIONS OF LAW REGARDING AARON MAXWELL

The Court finds that there are insufficient facts to support the argument of defendant that he has standing to contest the search at 1713 Sylvan Drive. Defendant's standing argument is based upon his affidavit stating he had a privacy interest in the residence. This affidavit alone is not sufficient in the Court's view. The Court finds no other indicia indicating the Defendant made 1713 Sylvan Drive his residence. This Court will not deny the admission of the affidavit as evidence but will give as much weight as this Court's judgment and counsel may allow. *U.S. v. Matlock,* 415 U.S. 164. As noted in *U.S. v. Briones-Garza,* 680 F.2d 417, whether a person has a reasonable expectation of privacy turns on the facts of each case. The Court concludes that the facts are insufficient to support defendant's allegation of residence in this cause. The Court additionally concludes that sufficient probable cause exists based upon the facts provided by the informant and the observance and surveillance of the arresting officers to allow the defendant to be arrested without an arrest warrant.

CONCLUSIONS OF LAW REGARDING ROYCE DAVID HEBERT

The Court concludes and the Government concedes that Royce David Hebert has a privacy interest in the home found at 1713 Sylvan Drive, Austin, Texas. The

Court concludes that Special Agent Braziel trespassed upon the property of 1713 Sylvan Drive while at night and that by listening at the garage door and pressing his nose to that door constituted an invasion of the curtilage of that property sufficient to constitute a search without warrant. *See Payton v. New York,* 445 U.S. 573. The curtilage of a private home is given a greater privacy expectation than an ordinary building or an automobile. *Fixel v. Wainwright,* 492 F.2d 480 (5th Cir. 1974). These facts present a severe invasion of privacy. *U.S. v. Davis,* 423 F.2d 974 (5th Cir. 1970). Therefore any information gathered during that search shall be struck from the affidavit. *Franks v. Delaware,* 98 S.Ct. 2674 (1978). The Court having excluded the statement in the affdavit regarding the three thuds heard by Agent Braziel finds that the affidavit contains sufficient remaining facts to support the search of 1713 Sylvan Drive. The Court concludes that there was sufficient evidence to connect the residence to the smuggling of marijuana. The Court additionally concludes that this information was not stale. The facts and circumstances described in the affidavit are sufficient to warrant a man of reasonable caution to believe marijuana was located at 1713 Sylvan Drive. *U.S. v. Minis,* 666 F.2d 134 (5th Cir. 1982).

SIGNED and ENTERED this 30th day of January, 1984.

James R. Nowlin
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1299

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLIFFORD J. ANTONE,
Defendant-Appellant.

No. 84-1302

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROYCE DAVID HEBERT,
Defendant-Appellant.

No. 84-1308

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MIKAL HABEEB AMUNY,
Defendant-Appellant.

No. 84-1315

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

AARON MAXWELL,
Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(February 11, 1985)

Before GEE, REAVLEY and RANDALL, Circuit Judges.

GEE, Circuit Judge:

The appellants, Clifford J. Antone, Mikal Habeeb Amuny, Aaron Maxwell, and Royce Hebert, were indicted on charges relating to marijuana possession and distribution. After the district court denied their pretrial motions to suppress evidence, the appellants each pleaded guilty to one count of conspiracy, reserving their rights to appeal the district court's rulings to this Court. We hold that the district court's rulings were correct and affirm the appellants' convictions.

The charges against the appellants in this case arise from the same factual background. Each appellant, however, advances different arguments in this appeal. Our opinion therefore first presents a summary of the facts of the case and then separately analyzes each appellant's claims.

I. FACTS

During late October 1982, United States Customs Officer David Harrison received information from a confidential informant who had previously provided Harrison with information that led to six arrests and five convictions on marijuana charges. The informant stated that Allan Granger and a person named Randy were to meet Clifford Antone and Mikal Amuny in Austin, Texas to obtain a quantity of marijuana. The informant also said that the marijuana was to be flown to Austin, but that he did not know where the plane was to land.

Officer Harrison immediately relayed this information to Drug Enforcement Administration (DEA) Agent Richard Braziel in Austin. Agent Braziel called Robert Nesteroff, a narcotics officer with the Texas Department of Public Safety, and asked him to conduct surveillance of Antone's and Amuny's residences and of a club operated by Antone. Nesteroff did so, but observed nothing out of the ordinary.

On November 1 the informant told Officer Harrison that Granger was in the Austin area and that the marijuana had arrive there. The informant stated that Granger was to meet Antone and Amuny at 7:00 that evening to receive the marijuana, adding that Granger was driving a white and blue Chevrolet Monte Carlo with Texas license number PCQ-658. Harrison relayed this information to Braziel. Braziel, who had been investigating Antone and Amuny since 1979, knew from another reliable informant that Antone usually conducted drug transactions in the parking lots of JoJo's and Denny's restaurant located at the intersection of Oltorf Street and Interstate 35 in Austin and that Antone used a black or Hispanic male to make the pick up and delivery.

Agent Braziel and several other agents established surveillance of the residences of Antone and Amuny and of the Jo-Jo's and Denny's restaurants. Between 7:00 and 7:30 p.m., Braziel saw Antone in the Jo-Jo's parking lot standing next to a black Lincoln Continental registered to Amuny and talking with an unidentified black male. A second black male, later identified as appellant Aaron Maxwell, climbed out of a Chevrolet pickup camper and walked over to Antone and the unknown man. The three men talked briefly, and Antone and the unknown man then left in the Lincoln. Maxwell followed in his camper, and the two vehicles arrived at Antone's house a short time later.

Officer Nesteroff had been watching Amuny's residence, where a blue Oldsmobile was parked. At about 7:00 p.m., a Buick registered to Amuny arrived. Shortly thereafter, Maxwell arrived in the camper, parked, and drove away in the blue Oldsmobile. Maxwell drove first to one of Antone's nightclubs, then to Jo-Jo's restaurant. Meanwhile, the agents at Antone's residence observed Amuny's Buick parked on the wrong side of the street and blocking Antone's driveway. Antone and Amuny got into the Buick and drove to Jo-Jo's. Agents at Jo-Jo's spotted Granger's Monte Carlo at Jo-Jo's at this time.

Ten minutes later, Maxwell left in Granger's Monte Carlo and drove to a nearby convenience store where he made a brief telephone call. He then drove to a house at 1713 Sylvan Drive that the agents believe to be a "stash house" for marijuana. Royce Hebert was the owner of this house. Maxwell drove into the garage, closing the garage door behind him. Agent Braziel, pursuing the car on foot, ran beside the house and hid in bushes near the garage. Braziel heard "thuds" of something heavy

being put into the trunk of the car and then heard the trunk lid slammed. The garage door opened and Maxwell drove the car away. Braziel then approached the garage and was able to smell marijuana when he put his nose close to the door.

Maxwell drove Granger's car back to Jo-Jo's and went inside. After a few minutes Granger left the restaurant, got into his car, and drove away. The agents followed Granger to the first traffic light on an access road to the interstate and blocked his car. As the agents approached his car, they noticed a strong odor of marijuana. The agents arrested Granger and later obtained a warrant to search Granger's car. The search disclosed 56 pounds of marijuana in the trunk.

Meanwhile, other agents arrested Antone, Amuny, and Maxwell as they were leaving the restaurant. The agents also obtained a search warrant for the house on Sylvan Drive. The search of that house disclosed a basement full of marijuana and that the two upstairs bedrooms were being used for growing, drying, and packaging marijuana. The agents also found several firearms in the master bedroom and scales and marijuana processing equipment in the hall closet. The agents found over 800 pounds of marijuana in the house, along with numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices.

After the appellants' arrest, a grand jury returned a three-count indictment against them, which was superceded by a four-count indictment. This indictment charged the appellants with distribution of marijuana, possession of marijuana with intent to distribute, and conspiracy to distribute and to possess with intent to distribute marijuana. The appellants made several pretrial evidentiary

motions, which the district court denied. The appellants then entered into plea agreements under which they pleaded guilty to one count of conspiracy and preserved their rights to appeal the district court's rulings on their pretrial motions. The district court accepted the appellants' guilty pleas, sentenced each appellant to five years imprisonment, and fined each $15,000.

II. DISCUSSION OF APPELLANTS' CASES

A. Appellant Clifford J. Antone

Antone appeals from the district court's ruling that the agents had sufficient probable cause to arrest him at Jo-Jo's without a warrant and the court's refusal on that basis to suppress his arrest and the search of his person made incident to the arrest. Antone also argues that he pleaded guilty involuntarily and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. Warrantless Arrest

Antone contends that the agents lacked probable cause to arrest him at Jo-Jo's without a warrant. Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *United States v. Woolery*, 670 F.2d 513, 515 (5th Cir.), *cert. denied*, 103 S.Ct. 78 (1982). The probable cause issue must be analyzed under the "totality of the circumstances" as to whether there is a "fair probability" that a crime is occurring. *Illinois v. Gates*, 103 S.Ct. 2317, 2332 (1983); *United States v. Marbury*, 732 F.2d 390, 395-96 (5th Cir. 1984). The probable cause requirement does "not demand any showing that such a belief is correct or more

likely true than false." *Texas v. Brown,* 103 S.Ct. 1535, 1543 (1983).

The facts of this case indicate that the agents had probable cause to arrest Antone and to conduct a search incident to the arrest. Before Antone's arrest, the agents had received specific and detailed information concerning the marijuana transaction from informants who had provided reliable information in the past. The informants told the agents when, where, and how the transaction would occur. The agents' surveillance corroborated the informants' tips. These facts, viewed in the totality of the circumstances, established probable cause. *See United States v. Cisneros-Mireles,* 739 F.2d 1000, 1002-03 (5th Cir. 1984); *United States v. Mendoza,* 722 F.2d 96, 101-02 (5th Cir. 1983).

2. Factual Basis of Guilty Plea

Antone next contends that the district court erred in accepting his guilty plea because the government failed to esablish a sufficient factual basis of his guilt. Antone argues that the facts the government offered showed merely that Antone was in the Jo-Jo's restaurant at the time the alleged criminal activity occurred, adding that the district court had no basis to conclude that he understood the charges against him at the time he pleaded guilty because the district court did not inform him of the "esoteric nature of the conspiracy count."

These contentions are meritless. To support a guilty plea, the prosecutor must present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States v. Davila,* 698 F.2d 715 (5th Cir. 1983). At the rearraignment hearing (at which the district court accepted the appellants' guilty

pleas), the prosecutor set forth the facts he expected the evidence at trial to show and read pertinent portions of the indictment. He stated that he would introduce evidence to show that the agents observed Antone talking with a black male in Jo-Jo's parking lot on the evening of November 1 and that the agents observed Amuny and Antone drive together from Antone's residence to Jo-Jo's that evening. The prosecutor also stated that he would show that personal documents belonging to Antone were found in the agents' search of the house on Sylvan Drive and that the agents found a beeper device on Antone's person and a corresponding beeper in the house. Finally, the prosecutor stated that eight telephone calls were made from July 1 to October 16, 1982, between a phone used by Allan Granger and Antone's residence or the beeper found on Antone at the time of his arrest. The prosecutor's presentation of these facts provided the district court with a sufficient basis on which to conclude that Antone was guilty of the offense to which he was pleading guilty.[1]

---

1. In addition, each defendant was present when the indictment was read in open court. Count One, to which the defendants pleaded guilty, stated in pertinent part:

> On or about November 1st, 1982, in the Western District of Texas and diverse other places to the grand jurors unknown Defendants Clifford J. Antone, Mikal Habeeb Amuny, Allen Joseph Granger, Royce David Hebert also known as Roy Sneed, and Aaron Maxwell unlawfully, willfully, knowingly did combine, conspire, confederate and agree together and with each other to distribute and possess with intent to distribute marijuana, a Schedule 1 controlled substance contrary to Title 21, United States Code, Section 841(a)(1) and in violation of Title 21, United States Code, Section 846.

Thereafter the court addressed each in identical terms regarding the charge. Antone's colloquy with the court was as follows:

> THE COURT: Mr. Antone, is that what you did?
> MR. ANTONE: Yes, sir.
> THE COURT: That's what you are pleading guilty to?
> MR. ANTONE: Yes, sir.

In addition, the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter at Antone's sentencing hearing in assessing whether Antone understood the charge against him and the significance of his guilty plea. *See United States v. Araiza*, 693 F.2d 382, 384 (5th Cir. 1982). The court specifically asked Antone whether he had committed the offenses charged, and Antone answered, "Yes, sir." The court then asked Antone: "That's what you are pleading guilty to?" and Antone again replied "Yes, sir." Moreover, Antone was represented by two competent and experienced criminal trial attorneys during this phase of the proceedings. Nothing in the record indicates that Antone failed to understand the charges against him. *See United States v. Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980).

3. Voluntariness of Antone's Plea

Antone's final contentions concern the voluntariness of his guilty plea and alleged government misconduct. Antone contends that the government deceived him by stating that only Royce Hebert had standing to object to the search of the house on Sylvan Drive. Because of this "misrepresentation," Antone argues, he believed that the evidence seized in the search of the house could be used against him at trial. Therefore, Antone contends, he pleaded guilty involuntarily. Antone also claims that the government violated its plea agreement with him by providing Texas authorities with information that they used to levy a sales tax on the marijuana transactions in which Antone took part.

These contentions are meritless. The record discloses no action or misrepresentation by the government that

prevented Antone from establishing his standing to contest the search. *See Rakas v. Illinois,* 439 U.S. 128, 133-34, 99 S.Ct. 421, 425-26, 58 L.Ed.2d 387, 394-95 (1978). Furthermore, the record indicates that Antone had no reasonable expectation of privacy in the house. Finally, the record contains no evidence regarding the Texas tax authorities on Antone's alleged tax liability. This issue is therefore not properly before us.

B. Appellant Mikal Habeeb Amuny

Amuny argues on appeal that the agents lacked probable cause to arrest him at Jo-Jo's restaurant and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. Warrantless Arrest

Amuny contends, as did Antone, that the agents lacked probable cause to arrest him as he left Jo-Jo's restaurant. Amuny's argument is identical to Antone's on this point. For the reasons stated in the discussion of Antone's argument on this issue, we hold that the district court correctly ruled that the agents had sufficient probable cause to arrest Amuny without a warrant.

2. Factual Basis of Guilty Plea

Amuny also contends that the district court had an insufficient factual basis on which to accept his guilty plea. As we have noted earlier, the prosecutor must present evidence sufficient to provide the district court with a basis to conclude to the court's subjective satisfaction that a defendant is guilty of the offense to which he is pleading guilty before the court can accept the guilty plea. *United States v. Davila,* 698 F.2d 715 (5th Cir. 1983).

Here, the prosecutor's summary of evidence to be presented at trial (which Amuny quotes and adopts as his statement of what the evidence would have shown) indicates that the district court had ample facts to satisfy itself of Amuny's guilty. These facts included evidence of Amuny's fingerprints, personal belongings, and transaction records found in the house on Sylvan Drive and testimony concerning Amuny's association with the other defendants. The district court did not err in accepting Amuny's guilty plea.

C. Appellant Aaron Maxwell

The sole issue that Maxwell raises on appeal is whether the district court properly denied his motion to suppress evidence taken from the house on Sylvan Drive. After Maxwell's arrest and indictment, he sought the challenge the agents' search of the house. Maxwell contends that he had standing to contest this search and that the magistrate lacked probable cause to issue the warrant. In ruling on Maxwell's motion to suppress, the district court concluded that Maxwell had no standing to object to the search. The court also ruled that the agents' affidavit supporting their request for a search warrant contained sufficient facts to establish probable cause and to justify the magistrate's issuance of a search warrant.

We conclude that the district court correctly ruled that Maxwell lacked standing to contest the search of the house on Sylvan Drive. A defendant has the burden of establishing his right to contest a search or seizure of a person or property. *United States v. Salvucci,* 448 U.S. 83, 86, 100 S.Ct. 2547, 2549-50, 65 L.Ed.2d 619, 624-25 (1980). To establish standing to contest a search, the defendant must show that he had a "legitimate expectation of

privacy" in the area searched. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387, 401 (1978). A defendant's legitimate presence on the searched premises, without more, is insufficient to establish standing. *Id.* at 142-43, 99 S.Ct. 430, 58 L.Ed.2d at 400-01.

Under the standard the Supreme Court has set forth, Maxwell has no standing to contest the search of the house. The agents found no clothes or personal belongings of Maxwell's in the house. Maxwell's fingerprints were found only on a spiral-ring notebook in the house. The only evidence Maxwell presented to the district court in support of his contention were Maxwell's own affidavit and an affidavit of Royce Hebert. The district court's conclusion that Maxwell had no legitimate expectation of privacy in the house and that Maxwell therefore lacked standing to contest the search was correct. *See United States v. Briones-Garcia,* 680 F.2d 417, 420 (5th Cir.), *cert. denied,* 103 S.Ct. 229 (1982). The probable cause issue is discussed in the next segment of our opinion.

D. Appellant Royce Hebert

After his arrest and indictment, Hebert moved to suppress all evidence seized from the house on Sylvan Drive, which was his residence. Hebert argued that Agent Braziel's entry onto the premises without a warrant when Maxwell drove into the garage tainted the search of the house conducted after the agents had obtained a warrant. Because of this taint, Hebert contends, the district court was required to suppress the evidence seized in the search as a "fruit of the poisonous tree."

The district court agreed that Braziel's entry onto the premises was illegal. The court, however, refused to suppress the evidence, ruling that even absent Braziel's ob-

servations sufficient probable cause existed to justify the issuance of the search warrant. The court therefore used the remedy the Supreme Court authorized in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and "purged the taint" by redacting the portions of the agents' affidavit that related to Braziel's illegal entry. On appeal, Hebert contends that the district court's redaction remedy was insufficient to purge the evidence of the taint of Braziel's illegal entry and that the court should have suppressed the evidence.

A court should interpret a search warrant and its supporting probable cause in a realistic and commonsense manner. *United States v. Maestas*, 546 F.2d 1177, 1180 (5th Cir. 1977). Viewing the search warrant involved here in this manner, we conclude that the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry. The affidavit the agents submitted to the magistrate to support their request for a search warrant set out numerous facts in great detail; Agent Braziel's observations constitute only a small part of the information presented to the magistrate. The district court's redaction of the search warrant and the court's ruling on the admissibility of the evidence obtained in the search of Hebert's residence were correct.

For the reasons stated, we conclude that the district court's evidentiary rulings and the court's acceptance of the appellants' guilty pleas were correct. The judgment of the district court is therefore

AFFIRMED.

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 84-1748, 84-1812, 84-1864 and 84-1878

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROYCE DAVID HEBERT, PETITIONER
v.
UNITED STATES OF AMERICA

CLIFFORD J. ANTONE, PETITIONER
v.
UNITED STATES OF AMERICA

MIKAL HABEEB AMUNY, PETITIONER
v.
UNITED STATES OF AMERICA

AARON MAXWELL, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the guilty plea proceedings showed that petitioners Antone and Amuny understood the nature of the charges against them, and whether there existed a sufficient factual basis to support the district court's acceptance of their pleas.

2. Whether there was probable cause to arrest petitioners Antone and Amuny.

3. Whether the evidence seized pursuant to a search warrant was the fruit of an antecedent illegal search (petitioners Maxwell and Hebert).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1748

ROYCE DAVID HEBERT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1812

CLIFFORD J. ANTONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1864

MIKAL HABEEB AMUNY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1878

AARON MAXWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-20a)[1] is reported at 753 F.2d 1301. The opinion of the district court (Pet. App. 1a-7a) is unreported.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 84-1864.

JURISDICTION

The opinion of the court of appeals was rendered on February 11, 1985, and rehearing was denied for Nos. 84-1812 and 84-1878 on March 15, 1985; and for No. 84-1864 on March 25 (rehearing was not sought in No. 84-1748). The petitions for a writ of certiorari were filed in No. 84-1748 on May 4, 1985; in No. 84-1878 on May 9, 1985; in No. 84-1812 on May 14, 1985; and in No. 84-1864 on May 24, 1985. The petition in No. 84-1748 was not timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the United States District Court for the Western District of Texas on charges relating to marijuana possession and distribution. Following the district court's denial of petitioners' motions to suppress evidence, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846, reserving their rights to appeal the district court's rulings. Each petitioner was sentenced to five years' imprisonment and a $15,000 fine. The court of appeals affirmed.

1. On October 28 and 29, 1982, Customs Patrol Officer Harrison contacted DEA Special Agent Braziel and informed him that Allen Granger and an individual identified as "Randy" were on their way to Austin, Texas, to meet petitioners Clifford Antone and Mikal Amuny to pick up a quantity of marijuana, which was being flown there.[2] Harrison advised Braziel that he had received this information from a confidential informant who in the past had provided information leading to six arrests and the seizure of a quantity of marijuana, and that the informant was getting his

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[2]Unless otherwise indicated, the statement of facts is taken from the opinions of the court of appeals and the district court.

information in this instance through conversations with Granger. On November 1, 1982, Harrison advised Agent Braziel that the marijuana had been landed in Austin and that Granger, driving a blue and white Chevrolet Monte Carlo with Texas license plate number PCQ-658, would meet Antone and Amuny at 7:00 that evening to pick up the substance.

As a result of prior investigations of Antone and Amuny, Braziel was aware from a separate source that Antone conducted marijuana transactions at JoJo's Restaurant near the intersection of Interstate 35 and Oltorf Road in Austin, Texas, and that he used a black or Hispanic male to deliver the marijuana. Braziel placed the restaurant at that intersection under surveillance on the evening of November 1, 1982. He saw Antone and an unidentified black male meet with petitioner Aaron Maxwell in the restaurant parking lot. Maxwell subsequently drove to Amuny's residence, left his pickup there, and drove back to JoJo's in another car. In JoJo's parking lot, Maxwell entered Granger's vehicle—the blue and white Chevrolet Monte Carlo with Texas license plate PCQ-658 that the informant had identified—drove to a convenience store, used its phone, and proceeded to a residence leased by petitioner Royce Hebert. When Maxwell drove the car into the garage and closed the door, Agent Braziel followed him on foot, and, while hiding in the bushes near the garage, heard the trunk of a car open, something being loaded into the trunk, and the trunk close. When he put his nose close to the garage door, he smelled marijuana. Maxwell then drove Granger's automobile back to JoJo's restaurant and went inside. Shortly thereafter, Granger walked out of the restaurant, drove away in his car, and was arrested at a red light. As the arresting officers approached Granger's car, they smelled marijuana. Agent Braziel seized the automobile and, after a warrant to search it was obtained, discovered 58 pounds of marijuana in the car trunk.

Meanwhile, other agents arrested Antone, Amuny,[3] and Maxwell as they were leaving JoJo's restaurant. Agent Braziel also obtained a federal search warrant for Hebert's residence. That search uncovered over 800 pounds of marijuana, several firearms, scales, processing and packaging equipment, and numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices. A beeper device found on Antone's person incident to his arrest corresponded to a beeper found in the house. Eight phone calls had been made by Granger to Antone's home or the beeper prior to the arrests. See 84-1864 Pet. 5; Jan. 30, 1984 Tr. of Re-Arraignment Proceeding [hereinafter cited as Tr. of Re-Arraignment] 42. Finally, the search revealed personal documents of Antone and Amuny, and fingerprints of Amuny and Maxwell.

2. The district court denied motions to suppress the evidence discovered in the search of Hebert's residence. It concluded (Pet. App. 5a-6a) that Maxwell, Antone, and Amuny did not have "standing" to challenge that search. Despite an affidavit submitted by Maxwell asserting a privacy interest in Hebert's residence, a post-search investigation did not reveal any keys, clothes, or other indicia that he resided there (*id.* at 4a-5a, 6a). Antone and Amuny did not produce any evidence to support any claim they might have had to a privacy expectation in the contents of the home (*id.* at 5a).

Hebert's argument that the search warrant authorizing the search of his residence was tainted by Agent Braziel's preceding unlawful search of the property was rejected on the merits. The district court agreed that Agent Braziel trespassed on the property of Hebert's residence, reasoning that "listening at the garage door and pressing his nose to

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[3]Earlier in the evening, Antone and Amuny had driven to JoJo's together from Antone's house.

that door constituted an invasion of the curtilage of that property sufficient to constitute a search without warrant" (Pet. App. 7a). Accordingly, the district court, citing *Franks* v. *Delaware*, 438 U.S. 154 (1978), struck from the affidavit supporting the search the statement regarding the three thuds Agent Braziel heard while listening at the garage (Pet App. 7a).[4] Even without that information, however, the court found that "the affidavit contains sufficient remaining facts to support the search" and denied Hebert's motion to suppress (*ibid.*).

The district court also concluded (Pet. App. 5a-6a) that there was probable cause to arrest Amuny, Antone, and Maxwell. (Hebert did not challenge the lawfulness of his arrest, apart from his effort to suppress the evidence at his residence.) The court noted that the informant's information provided sufficient detailed facts from which the officers could believe that a crime was being committed, and that the "past reliability of the informant and the corroboration of other law enforcement officers' independent investigation meets the totality of the circumstances test of *Illinois* v. *Gates*, [462 U.S. 213 (1983)]" (Pet. App. 5a).

Having lost their pretrial motions, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute. They reserved the right to appeal the district court's rulings on the suppression motions, and did so.

3. The court of appeals affirmed. After reviewing the summary of the evidence presented by the prosecutor at the

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[4]The warrant application, signed by Braziel, set out in five detailed paragraphs the facts briefly described at pages 2-4, *supra*. The two sentences redacted out read: "Special Agent Braziel further heard a car trunk lid being opened. Further, Special Agent Braziel heard a noise like heavy objects being thrown of a trunk in a vehicle, after which the trunk lid slammed." See U.S. Br. in the Court of Appeals 17-19.

rearraignment, the court rejected arguments by Antone and Amuny that there was not a sufficient factual basis to warrant the district court's acceptance of their pleas (Pet. App. 14a-16a, 17a-18a). The court similarly rejected Antone's contention that the district court had no basis to conclude that he understood the charges against him, finding instead that "the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter" in determining that Antone understood the charges, and that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a). The court below also concluded (*id.* at 13a-14a, 17a) that there was probable cause to arrest Antone and Amuny. The court reasoned that the agents had received "specific and detailed information" of "when, where, and how" the marijuana transaction would occur from "informants who had provided reliable information in the past," and that the agents' own surveillance had corroborated those tips (*id.* at 14a).[5]

Finally, the court of appeals agreed with the district court that Maxwell lacked standing to challenge the search of Hebert's residence because he had no legitimate expectation of privacy in it, and it rejected Hebert's argument that the district court was required to suppress the evidence seized in the search of the house because the warrant was tainted by Agent Braziel's earlier trespass (Pet. App. 18a-20a). Reasoning that the warrant "set out numerous facts in great detail," of which Agent Braziel's observations constituted "only a

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[5]Antone also argued to the court of appeals that the government deceived him by stating that only Hebert had standing to object to the search of his house and that the government violated its plea agreement with him by providing Texas authorities with information they used to levy a sales tax on his marijuana transactions. The court of appeals rejected these claims as "meritless" and without basis in the record (Pet. App. 16a-17a), and Antone does not raise them in his petition.

small part," the court found that "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*id.* at 20a).

ARGUMENT

The fact-bound issues raised by petitioners were correctly decided by the courts below and involve no points regarding which there is disagreement among the circuit courts. Further review by this Court is unwarranted.

1. Petitioners Antone and Amuny contend that their guilty pleas are invalid because the charges against them were not adequately explained in the Rule 11 proceeding. They claim further that their pleas were erroneously accepted because they were not supported by a sufficient factual basis. These claims are without merit.

a. Petitioners Antone and Amuny [6] maintain (84-1812 Pet. 6-9; 84-1864 Pet. 13-17) that the court of appeals utilized the wrong standard in ascertaining whether the record established that they understood the nature of the charges to which they pleaded guilty. Antone, for instance, contends that the court of appeals' conclusion that "[n]othing in the record indicates that [he] failed to understand the charges against him" (see Pet. App. 16a) is a "negative standard" that conflicts with decisions of this Court, earlier decisions of the court below, and decisions in other circuits (84-1812 Pet. 6). Without suggesting that they in fact failed in the slightest to understand the charge to which they pleaded, petitioners assert that these decisions, and Rule 11 of the Federal Rules of Criminal Procedure, establish that the record of a guilty plea's acceptance must affirmatively demonstrate a defendant's understanding of the charges against him, which, they contend, the record here does not do.

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[6] We note that Amuny did not raise this claim before the court of appeals.

The record here, however, *does* affirmatively demonstrate that petitioners understood the nature of the charges to which they pleaded guilty, thus undercutting the premise of their contention. As the court below determined, the proceedings fully comported with Rule 11. The statement by the court seized upon by petitioner Antone as evincing the use of a "negative standard" supports their contentions only if taken wholly out of context.

At the rearraignment, the district court judge meticulously assessed whether petitioners understood the charges to which they were pleading guilty. Petitioners said they understood the charges (Tr. of Re-Arraignment 30), had no questions about them (*ibid.*), had discussed them with their lawyers (*id.* at 18, 24-25, 29), and had done and were pleading guilty to what the indictment said (*id.* at 37). The lawyers too expressed their belief that petitioners understood the proceedings (*id.* at 6). The district judge also found that petitioners "fully understood the charges" (*id.* at 47). Besides the fact that each petitioner and his lawyer said he understood the charges, there was abundant other evidence to support the district judge's finding. Petitioners were told twice that they were being charged with conspiracy to possess and distribute marijuana (*id.* at 23), a reasonably self-explanatory charge that is not difficult to understand. See *United States* v. *Dayton*, 604 F.2d 931, 938, 941-943 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Amuny had a college degree (Tr. of Re-Arraignment 5) and had been convicted of possession of marijuana before (84-1864 Pet. 6); Antone had graduated from high school (Tr. of Re-Arraignment 5). Each heard the indictment (*id.* at 35-37) and the outline of the evidence the government would present read to him at the rearraignment (*id.* at 38-42). It was, therefore, correct for the district court to conclude that petitioners understood the charges against them—and for

the court of appeals to find this conclusion supported by the record. Compare *Brown* v. *Perini*, 718 F.2d 784 (6th Cir. 1983).[7]

Moreover, even if it were concluded that a more detailed explanation of the charge was required by Rule 11, the failure to do so would be harmless error here in light of the extensive record at the rearraignment hearing. See Fed. R. Crim. P. 11(h). It is simply implausible that these defendants, both represented by counsel, and both competent and reasonably well-educated, would not be able to understand a rather simple charge presented to them in the well-explained context it was (of course, petitioners do not assert that they did not in fact understand the charge). As the Advisory Committee noted when recommending the addition of an explicit harmless error provision in 1983, "Rule 11 should not be given such a crabbed interpretation that ceremony [is] exalted over substance."[8] While the cases

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[7]In the cases cited by petitioner Antone (84-1812 Pet. 7-9), the district court record had substantially less evidence in it that defendant understood the charges against him. Moreover, a number of the cases he cites involved instances where the record contained affirmative evidence that the guilty plea was in some way actually defective, which no one argues is the case here. Cases more on point than petitioner's include: *United States* v. *Thompson*, 680 F.2d 1145, 1153-1155 (7th Cir.), cert. denied, 459 U.S. 1089 (1982) and 459 U.S. 1108 (1983) ("It is sufficient if the colloquy between the court and the defendant would lead a reasonable person to believe that the defendant understood the nature of the charge."); *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977) (discussed note 8, *infra*); *Seiller* v. *United States*, 544 F.2d 554, 562-563 (2d Cir. 1975) ("We hold that the district court here was amply justified in relying on the reading of the indictment, coupled with [defendant's] discussions with his attorney, his age (47), his university education, his representation by counsel, his 'alacrity of responses and his show of intelligence'—in short, the court's total impression of the defendant and his understanding of the proceedings—to establish that [he] understood the nature of the charges" (citations omitted).).

[8]An illustration of harmless error under Rule 11(h) given by the Committee was "where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime

cited by petitioner Antone (84-1812 Pet. 7-9) are otherwise distinguishable as well (see note 7, *supra*), all but two antedate Rule 11(h) and only one—another Fifth Circuit case—reverses a conviction after consideration of the rule.[9] The new rule is already changing the law in the circuits. See *United States* v. *de le Puente*, 755 F.2d 313, 314-315 (3d Cir. 1985), petition for cert. pending, No. 85-178; *United States* v. *Stead*, 746 F.2d 355, 356-357 (6th Cir. 1984), cert. denied, No. 84-6137 (Mar. 4, 1985); see also *United States* v. *Kearney*, 750 F.2d 787, 790-791 (9th Cir. 1984).

Especially in light of its conclusion that there was no violation of Rule 11, the court of appeals' statement that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a) cannot reasonably be understood to establish some significant new standard for assessing Rule 11 violations. Rather, the statement appears to mean simply that there is nothing in the record of the plea proceedings that undercuts the conclusion suggested by that record that petitioners understood the charges to which they pleaded guilty. In light of the record and the court's entire opinion, it is abundantly

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was not mentioned, but the defendant's responses clearly indicate his awareness of that element." The note approvingly cites *United States* v. *Coronado*, *supra*, where, as the Committee had explained earlier, the court first held that the charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then found no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that [defendant] understood them" (554 F.2d at 173).

[9] *United States* v. *Corbett*, 742 F.2d 173, 178-179 (5th Cir. 1984), found a Rule 11 proceeding prejudicially defective where the information counts were not read to defendant and defendant had not received a copy of them. As discussed above, that is not the case here.

clear that petitioners understood the charges to which they pleaded guilty. Thus, their claim was properly rejected.[10]

b. Antone and Amuny also maintain (84-1812 Pet. 9-12; 84-1864 Pet. 7-12) that there was not a sufficient factual basis to support the district court's acceptance of their guilty pleas. However, the prosecutor recited a convincing and lengthy factual basis (84-1864 Pet. 3-7), and read pertinent portions of the indictment in support of the pleas of guilty (Tr. of Re-Arraignment 34-37). In summary, he stated that he would introduce evidence that on November 1, 1982, Antone met with petitioner Maxwell at JoJo's parking lot. Later, Antone and Amuny drove together from Antone's home to JoJo's Restaurant. Maxwell, meanwhile, drove to Amuny's residence, switched cars, and returned to the restaurant. Maxwell then picked up Granger's car, drove to Hebert's residence, and returned to JoJo's. The driver of the car, Granger, was then arrested and 58 pounds of marijuana found in the trunk of the automobile. Personal documents belonging to Antone and Amuny were found in the search of the residence which also uncovered approximately 800 pounds of marijuana. Also found during the search were Amuny's fingerprints and a beeper that corresponded to one worn by Antone. Eight phone calls from Granger were made to Antone's home or beeper from July 1 to October 16, 1982. Several days prior to the arrests, Amuny's car was observed at Browning Aerial Service at

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[10]Petitioner Antone further argues (84-1812 Pet. 11-12) that his plea cannot have been voluntary because he did not admit that the evidence the government would present was true (Tr. of Re-Arraignment 44). On its face this argument seems to go to the factual basis of the plea (Fed. R. Crim. P. 11(f)), rather than its voluntariness (Rule 11(d)), though it is unconvincing in that context as well (see note 11, *infra*). In any event, even with petitioner's eleventh-hour reservations about whether he would endorse the government's evidence, there was more than enough in the record to support the district court's finding, and the court of appeals' affirmance, that the plea was voluntary, understanding, *and* factually based.

the Austin Airport. Amuny had been convicted in 1973 of possession of 150 pounds of marijuana. Finally, because of the evidentiary proceedings on the motion to suppress, the judge was aware of additional facts supporting the charges against petitioners (see Pet. App. 1a-7a).

Thus, the district court specifically found that there was a factual basis to support each of the defendants' pleas (Tr. of Re-arraignment 47). Following a review of the prosecutor's proffer to the district court and of the indictment, the court of appeals agreed (Pet. App. 14a-15a, 17a-18a). Given these concurrent factual findings by both lower courts, review by this Court of petitioners' fact-bound claims is unwarranted.[11]

2. Petitioners Antone and Amuny also contend (84-1812 Pet. 4-6; 84-1864 Pet. 17) that their arrests were not supported by probable cause. Since it does not appear that any evidence used by the prosecution was seized from petitioner

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[11]Antone confuses (84-1812 Pet. 10-12) the voluntariness issue with the sufficient factual basis issue (see note 10, *supra*). As we discuss in the preceding point, his plea was voluntary; it also had a sufficient factual basis. It is not necessary to the existence of a sufficient factual basis that defendant admit the facts the prosecution says it will present; all that is necessary, as the Fifth Circuit said (Pet. App. 14a), is that "the prosecutor * * * present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States* v. *Davila*, 698 F.2d 715 (5th Cir. 1983)." See also *United States* v. *Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Despite Amuny's and Antone's arguments that there was an inadequate factual basis for the conspiracy and intent elements of the charge, respectively, the evidence outlined above could certainly satisfy a judge that those elements were present. (There is also no indication here of any motive for petitioners to plead guilty to crimes they did not commit, especially if they thought the prosecutor possessed an inadequate factual basis to establish guilt. Compare *North Carolina* v. *Alford*, *supra*.)

Amuny incident to his arrest, the legality of that arrest is immaterial to the validity of his conviction. In any event, for many of the same reasons that there existed an adequate factual basis for petitioners' guilty pleas, there was also probable cause for their arrests.

Before the arrests, the agents had received "specific and detailed information" from reliable informants concerning a planned sale of marijuana by petitioners to Granger (Pet. App. 14a). As the court of appeals observed, the "informants told the agents when, where and how the transaction would occur," and "the agents' surveillance corroborated the informants' tips" (*ibid.*). For instance, Antone was observed meeting with Maxwell at a location identified by an informant as the likely site of the transaction, Maxwell then drove to Amuny's and later drove Granger's car, with the make and license plate identified by the informant, to Hebert's to pick up the marijuana, returning to the restaurant where Granger waited and where petitioners were also present. Viewed in the "totality of the circumstances" (see *Illinois* v. *Gates*, 462 U.S. 213 (1983)) there was ample basis for the findings below that probable cause existed to arrest Antone and Amuny (Pet. App. 7a, 17a-18a).

3. Petitioners Maxwell[12] and Hebert contend (84-1878 Pet. 10-14; 84-1748 Pet. 7-11) that the evidence discovered

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[12]Petitioner Maxwell was held by the courts below to lack "standing" to challenge the warrant to search Hebert's house, on the ground that he had failed to establish a reasonable expectation of privacy in those premises (Pet. App. 6a, 18a-19a). He contends (84-1878 Pet. 7-10) that his right of access to the house was indeed sufficient to afford him a right of privacy therein. We think that both petitioner and the courts below address the wrong question. The relevant privacy interest is not that affected by the execution of the warrant, but that infringed by the action found to be illegal—Agent Braziel's trespass upon the property to hear and smell what was happening in the garage. While this entirely distinct "standing" issue raises an interesting, if somewhat obscure, point, there is surely no need to consider it here because, as explained in text, the evidence seized under the warrant was not a fruit of any illegality committed by Agent Braziel.

during the search of Hebert's residence should have been suppressed because the search warrant was tainted by Agent Braziel's earlier illegal trespass on Hebert's property. This contention was rejected on the ground that the showing of probable cause to support issuance of the warrant did not depend on the information thus gained (Pet. App. 13a). In such circumstances, the courts have traditionally held that evidence seized pursuant to the warrant is not a tainted fruit of the illegally obtained information contained in the warrant affidavit. See, *e.g., United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13-15; *United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Taborda,* 635 F.2d 131, 140-141 (2d Cir. 1980); *United States* v. *House,* 604 F.2d 1135, 1143 (8th Cir. 1979), cert. denied, 445 U.S. 931 (1980); *United States* v. *Watts,* 540 F.2d 1093, 1095 n.2 (D.C. Cir. 1976). See also *United States* v. *Marchand,* 564 F.2d 983, 992-995 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) (Friendly, J.) (collecting the cases and discussing the rule's rationale). This Court has applied the same analysis in deciding whether deliberately or recklessly false averments in the affidavit invalidate the warrant. *Franks* v. *Delaware,* 438 U.S. 154, 171-172 (1978).[13]

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[13]There is not, as suggested by petitioner Maxwell (see 84-1878 Pet. 13), a conflict among the circuits on the appropriate standard to apply when assessing a search warrant containing information from an antecedent illegal search. Contrary to Maxwell's claim, the Sixth Circuit does follow the approach in *Franks* and *Karo,* and will uphold a warrant if, after excluding illegally obtained information, the balance of the affidavit establishes probable cause. See, *e.g., United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Korman,* 614 F.2d 541, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980). The two cases cited by petitioner are not in any way inconsistent with the approach taken in *Franks* and *Karo*—see *United States* v. *Giordano,* 416 U.S. 505, 556 n.6 (Powell, J., concurring in part and dissenting in part); *United States* v. *Grunsfeld,* 558 F.2d 1231, 1241 (6th Cir.), cert. denied, 434 U.S. 872 (1977) and 434 U.S. 1016 (1978)—and were, in any event, decided before them and the more recent Sixth Circuit cases. Maxwell does not claim that any other circuit (besides the Sixth) is in disagreement with the approach taken by the Fifth Circuit in this case.

Petitioners suggest that this analysis has been placed in doubt by *Segura* v. *United States,* No. 82-5298 (July 5, 1984). In Hebert's view (84-1748 Pet. 7-11), *Segura* formulated a test that looks instead to whether the prior illegal intrusion contributed in any way to the discovery of the evidence seized under the search warrant. We are not sure that this formulation reaches a result different from the traditional approach: if there is probable cause even after the illegal evidence is excised from the warrant, it is difficult to see how it contributes to the finding of subsequent evidence. Similarly, the "critical element" formulation advocated by petitioner Maxwell (84-1878 Pet. 10-13) appears to be, even on its own terms, really nothing more than the traditional *Franks* test: if there was adequate evidence to support the warrant when the illegal evidence is excised (*i.e.,* if that evidence is not "critical"), then the warrant is valid. See *Segura,* slip op. 19. That test is met here.

In any event, petitioners' contention that *Segura* creates a new rule is absurd. This Court gave no indication it was undertaking such a dramatic reversal; indeed, just two days earlier, in *United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13, the Court had reaffirmed the *Franks* approach. In *Karo,* in the context of cleansing a tainted warrant, the Court stated that, despite the presence in the supporting affidavit of illegal evidence, "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nonetheless valid." That is precisely the situation here. *Segura,* on the other hand, had nothing to do with a "cleansed" warrant.

In any event, *Segura* stated that "[w]hether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized" (slip op. 17) and that "our cases make clear that evidence will not be excluded as 'fruit' unless the illegality is

at least the 'but for' cause of the discovery of the evidence" (*id.* at 19). These principles, of course, would indicate that *Franks* and *Karo* are still viable. So does *Segura's* holding: if the illegal prior entry there did not invalidate an otherwise valid search warrant, there is no reason why the prior trespass here should invalidate a search warrant valid once cleansed. Petitioners' attempt to manufacture a new—and vague and confusing—standard from *Segura* by taking phrases from it out of context is wholly unconvincing.

Only two sentences in Braziel's lengthy affidavit (see note 4, *supra*) contained evidence relating to his earlier observations at Hebert's residence, which the district court believed were the product of an impermissible trespass.[14] The district court reviewed the warrant, leaving out those two sentences, and found that it contained "sufficient remaining facts to support the search" (Pet. App. 7a). As the court of appeals observed (*id.* at 20a), the "request for a search warrant set out numerous facts in great detail," of which Agent Braziel's allegedly illegal observations constituted "only a small part." Thus, the court correctly concluded, "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*ibid.*).[15]

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[14]We do not concede that the district judge properly excluded Agent Braziel's observations. Nevertheless, because the information is not necessary to the warrant's validity, this brief assumes that the ruling was correct.

[15]Hebert also complains (84-1748 Pet. 11-13) that the court below erred in failing to strike from the warrant affidavit as a fruit of Braziel's earlier illegal search the agent's observations concerning Granger's arrest. But probable cause to stop and arrest Granger existed without Braziel's observations at the residence, for the same reasons that there was probable cause to arrest petitioners Antone and Amuny (see pages 12-13, *supra*).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1985